

February 5, 2013

**VIA ELECTRONIC DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation  
CG Docket No. 02-278**

Dear Ms. Dortch:

On Friday, February 1, 2013, Michele C. Farquhar and Mark W. Brennan of Hogan Lovells US LLP, counsel to Communication Innovators ("CI"), along with Darrin Bird, Executive Vice President of Global Connect LLC, met with Sean Lev, Suzanne Tetreault, and Marcus Maher of the Commission's Office of General Counsel to discuss CI's pending Petition for Declaratory Ruling ("Petition") regarding the non-telemarketing use of predictive dialers under the Telephone Consumer Protection Act ("TCPA"). The CI and Global Connect representatives distributed the attached handout at the meeting.

During the meeting, the representatives encouraged the Commission to grant the CI Petition and address the confusion regarding whether predictive dialers that lack the required ability to generate and dial random or sequential numbers are "autodialers" under the TCPA. Specifically, the Commission should clarify the meaning of "capacity" in the TCPA and confirm that predictive dialers used for non-telemarketing purposes only qualify as "autodialers" if they have the "current ability" to generate and dial random or sequential numbers. Such equipment must have random or sequential number generation and dialing as a functioning feature – one that can be used readily and without further software or device changes (e.g., without the installation or modification of software or hardware). A broader interpretation of "capacity," on the other hand, risks encompassing all calls made by and text messages sent by smartphones and other personal devices. Mr. Bird noted that Global Connect's hosted predictive dialer cloud solution does not have the current ability to generate and dial random or sequential numbers, and such functionality is not available to customers.

The representatives also discussed the significant privacy and consumer benefits of using predictive dialers instead of manual dialing. For example, predictive dialers can prevent improper calls to numbers on Federal, state, or entity-specific do-not-call lists; limit calls to certain times of the day, days of the week, number of attempts per campaign; enable consumer-specific calling

preferences (*i.e.*, contact me at my work telephone number during the day and my home telephone number at night); allow a specified amount of time to lapse between calls; provide for timely scheduled callbacks requested by a customer; and eliminate “wrong number” dialing caused by manual number entry. They also assist companies in complying with Federal and state consumer protection laws. Mr. Bird also discussed the recent beneficial use of Global Connect’s predictive dialers to place calls on behalf of local municipalities, utility companies, and other groups to residents affected by Hurricane Sandy.

In addition, the representatives confirmed that granting the CI Petition will not enable any new unwanted calls. Live representatives are already allowed to dial customers manually for non-telemarketing, informational purposes, and predictive dialers increase efficiency by connecting these live representatives with consumers while weeding out unproductive calls. Granting the CI Petition also will not provide any new ability for parties to send unwanted text messages – companies can already send non-telemarketing, informational text messages manually, and they do not have an incentive to flood customers with informational text messages.

In response to a question from FCC staff, the representatives explained that Congress never intended for the TCPA to limit non-telemarketing, informational calls placed using live representatives and predictive dialers. Instead, Congress’s goal was to curb abusive telemarketing and “robocalling” practices that, among other things, threatened public safety by tying up emergency lines and blocks of telephone numbers.

The representatives also explained that the Commission can grant the CI Petition and promote U.S. call center jobs while continuing to prevent telemarketing abuses. The CI Petition is limited to non-telemarketing calls, and the Commission has ample authority to distinguish between telemarketing and non-telemarketing, informational calls when it clarifies the meaning of “capacity.” In fact, the Commission made a similar distinction between telemarketing and informational calls in the *Robocall Report and Order*<sup>1</sup> and the recent *SoundBite Declaratory Ruling*.<sup>2</sup> The Commission can make the same distinction here to facilitate innovative non-telemarketing uses of predictive dialers and other consumer-friendly technologies while still preventing harm from unwanted telemarketing calls. Moreover, the representatives noted that the TCPA has separate do-not-call protections built in to limit unwanted telemarketing calls, including the national registry and company-specific do-not-call lists.

During the meeting, the representatives also discussed prior filings from CI and other parties in this docket.<sup>3</sup>

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<sup>1</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012) (“*Robocall Report and Order*”).

<sup>2</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, FCC 12-143 (rel. Nov. 29, 2012) (“*SoundBite Declaratory Ruling*”).

<sup>3</sup> See Reply Comments of Communication Innovators, CG Docket No. 02-278, 3-5 (Nov. 30, 2012); Comments of Global Connect LLC, CG Docket No. 02-278, 1 (Nov. 15, 2012); Comments of Noble Systems Corporation, CG Docket No. 02-278, 8 (Nov. 15, 2012); *Ex Parte* Filing by Encore Capital Group, Inc. and Midland Credit Management, Inc., CG Docket No. 02-278, slides at 5-7 (Feb. 27, 2012).

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

*/s/ Michele C. Farquhar*

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**MEETING TO DISCUSS CI PETITION WITH FCC OFFICE OF GENERAL COUNSEL  
FEBRUARY 1, 2013**

- The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”
- Many commenters agree that the Commission should grant the CI Petition and address the widespread confusion regarding whether predictive dialers that lack the required ability to generate and dial random or sequential numbers are “autodialers” under the TCPA.
- There is broad agreement among commenters that the term “capacity” means the “current ability” or “present capacity” (not the “theoretical ability” or “future capacity”).
  - The plain meaning of “capacity” is “ability,” and today’s predictive dialers have no number-generating abilities (sequential, random, or otherwise) – they merely assist live representatives in dialing numbers that have been entered into them.
  - Congress’s choice of the present tense “has the capacity” is informative. Equipment should only be considered an autodialer if, *at the time of use*, it has the “current ability” to generate and dial random or sequential numbers without first being technologically altered.

To meet this “current ability” standard, equipment must have random or sequential number generation and dialing as a functioning feature – one that can be used readily and without further software or device changes ( <i>e.g.</i> , without the installation or modification of software or hardware).
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- Interpreting “capacity” as “future capacity” unreasonably exposes all smartphone users to TCPA liability for simple misdials.
- The comments confirm that the TCPA requires a capacity “to store . . . telephone numbers to be called, *using a random or sequential number generator*” – it is not enough for the equipment to have only the capacity *to store* randomly or sequentially generated numbers.
  - If the mere capacity *to store* randomly or sequentially generated lists of numbers makes equipment an autodialer, almost all calls made today would be considered autodialed. All smartphones would fall within the TCPA’s autodialer definition, as would many basic wireless handsets and traditional landline telephones.
- Commenters overwhelmingly support the use of predictive dialers for innovative, non-telemarketing purposes.
- Predictive dialers offer significant privacy and consumer benefits over manual dialing.
- Granting the CI Petition will not allow any new unwanted calls.
- To the extent that the Commission may be concerned about enabling unwanted telemarketing calls, it has ample authority to prevent such abuse while still granting the CI Petition.
- Although prior express consent is a defense in TCPA litigation, it is a costly defense to exercise.